Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

*Cross-Petitioner,*

*v.*

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

*Cross-Respondents.*

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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20 pp

## QUESTION PRESENTED

1. Whether the Supreme Court of Arkansas erred by holding that the *Gore* factors should be given "equal weight" when this Court has said that the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Opinion Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitutional Provision Involved | 1 |
| Statement of the Case | 1 |
| Factual Background | 1 |
| Procedural History | 5 |
| Reasons for Granting the Conditional Cross-Petition for a Writ of Certiorari | 8 |
| The Supreme Court Of Arkansas Erred In Failing To Recognize That The Most Important Indicium Of The Reasonableness Of Punitive Damages Is The Reprehensibility Of The Conduct And In Failing To Recognize The Weight To Be Given To The Terms Of Imprisonment For The Conduct At Issue. | 8 |
| Conclusion | 15 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) ..... *passim*

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) ..... *passim*

*TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) ..... 12

**United States Constitution:**

U.S. Const. amend. XIV, § 1 ..... 1

**Statutes and Rules:**

28 U.S.C. § 1257(a) ..... 1

Ark. Code Ann. § 5-4-201(a)(2) ..... 13

Ark. Code Ann. § 5-4-401(a)(5) ..... 13

Ark. R. Civ. P. 42(b) ..... 6

Fed. R. Civ. P. 42(b) ..... 6

Supreme Court of Arkansas Rules 2-3 ..... 8

United States Supreme Court Rule 12.5 ..... 1

*Cited Authorities*

*Page*

**Other Authorities:**

Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363 (1994) . . . . . 9

Cross-Petitioner, Lon C. Sauer, individually, and as administrator of the Estate of Margaretha Sauer (the "Sauer Estate"), conditionally cross-petitions for writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

## OPINION BELOW

The opinion of the Supreme Court of Arkansas, to be published in S.W.3d, is currently available at 2003 WL 1996087. It is also included in the appendix to the petition for writ of certiorari filed by Advocat, Inc., *et al.*

## STATEMENT OF JURISDICTION

The original petition for writ of certiorari filed by Advocat, Inc., *et al.*, was docketed on July 30, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioners' petition for writ of certiorari.

## CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE

**Factual Background.** This case presents one of the more squalid fact situations ever to come before this Court. While in the care of Rich Mountain Nursing and Rehabilitation

Center, Margaretha Sauer was repeatedly left to lie in her own waste for such long periods of time that excrement dried to her skin and brown circles or halos of dried urine formed around her body on the sheets of her bed. She was repeatedly found to have excrement under her fingernails. She developed pressure sores on her buttocks and on her back. She developed blisters between her legs. One record notes that her blisters were bleeding. Some of these sores and blisters were as large as a softball or an adult fist and two or three centimeters deep. These sores and blisters were caused by neglect. As much as five days passed without a change of wound dressings. The sores became infected.

Mrs. Sauer also developed contractures, a painful condition in which the limbs of a person contract and lose their range of motion. Mrs. Sauer had contractures in all four limbs. She was in a fetal position. Both of her arms were drawn up, and her hands were closed. This condition is caused by neglect.

Witnesses testified that Mrs. Sauer "was always thirsty." She told one of her sons that she would probably die hungry. During the last month of her life, she lost 15 pounds without her doctor's being notified. For the last 24 to 48 hours of her life, she was given nothing to eat or drink. Upon her final hospitalization, there was a greenish, foul-smelling discharge from her vagina that had not been noticed or addressed at the nursing home.

Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. The nursing home records show that she ate everything that she was offered for breakfast on the last two days of June 1998, yet she was fed little or not at all in July 1998. She died on July 19, 1998. She could have

been hydrated intravenously, but that was not done. According to one expert witness at trial, the failure to provide appropriate nutrition and hydration, which resulted in Mrs. Sauer's death, was an "outrageous deviation from the standard of care." Another expert testified that this conduct was "absolutely below the standard of care. I would call it conscious indifference."

The evidence at trial established that the neglect and ultimate death of Mrs. Sauer were caused by inadequate staffing and inadequate resources at the nursing home. Employees of the nursing home complained on many occasions about inadequate staffing, and they complained about the lack of supplies to care for the residents properly. They were told to quit complaining.

Mark Hemingway, the divisional vice president for the management company, Diversicare Management Services Company, testified that he was aware of the problems with short-staffing at the nursing home and that he discussed these problems with his supervisor, the vice president of operations. Mr. Hemingway attributed the short-staffing to a shift in corporate philosophy beginning in 1996, "when they started talking more about cost-cutting than quality." Prior to this time, Mr. Hemingway could not recall this facility's having any in-house generated bedsores. Mr. Hemingway was fired when he did not reduce staff to meet budget.

Evidence showed that the Petitioners (the "Advocat Defendants") knew that the facility was inadequately staffed and that the Office of Long-Term Care ("OLTC") of the State of Arkansas would take action if this inadequate staffing were discovered. Rather than correct the inadequate staffing, the Advocat Defendants attempted to deceive the OLTC and the

families of residents. During OLTC inspections, the Advocat Defendants brought in employees from other facilities, who disappeared after the inspectors left. They placed uncertified personnel on the floors to create a false appearance that the facility was adequately staffed. They directed employees to falsify charts to make it appear that certified personnel were providing care while they were absent.

All three of the Advocat Defendants participated in the management and direction of this nursing home. Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, owned the facility and employed most of the staff. A management agreement provided that Diversicare Management had "full, exclusive control and responsibility of the management of the facility and its operations in all respects." This responsibility, according to the management agreement, included hiring and supervising staff, establishing and maintaining a system of patient care, supervising inventories, and preparing budgets. Diversicare Management prepared policies and procedures manuals to guide the facility. Diversicare Management received a management fee based on a percentage of the facility's revenue. Diversicare Management employed the facility's administrator. Diversicare Management employees instructed the facility's employees to falsify records in order to deceive the OLTC.

Both Diversicare Leasing and Diversicare Management are wholly owned by Advocat, Inc. Advocat, Inc., was paid a fee for "general oversight" of the facility. The budgets were submitted to Advocat, Inc., which instructed the personnel of Diversicare Management or Diversicare Leasing what changes needed to be made in those budgets. Advocat, Inc., implemented a program called "Continuous Quality

Improvement" to direct the quality of care in the nursing home. Yet, the Advocat, Inc., board of directors approved the budget without even considering reports concerning the care of the residents or results of surveys from the OLTC. A bonus system rewarded persons who met Advocat, Inc.'s budget.

Mary Margaret Hamlett, former chief financial officer and member of the board of directors of Advocat, Inc., testified, "I can tell you from the company's perspective these were one. These were operated as if it was one company." Ms. Hamlett stated that, while Diversicare Management and Diversicare Leasing legally were separate entities, they were operated as one nursing home division of the parent company. All of the money collected from the operation of the nursing home at issue was deposited into a regional account in Nashville, Tennessee, and "used to pay bills for the whole company." Mrs. Hamlett testified by video deposition. Her exact testimony was known long before trial. Yet, her testimony was uncontradicted at trial.

Ms. Hamlett also testified, without objection, regarding the extent of the Advocat Defendants' operations. Pet. App. 18a. Still, no evidence was introduced regarding the Advocat Defendants' misconduct in states other than Arkansas or at nursing homes other than the one where Mrs. Sauer resided.

**Procedural History.** The Sauer Estate's complaint asked for judgment jointly and severally against the Advocat Defendants for both compensatory and punitive damages. In their answer, the Advocat Defendants objected to the determination of the amount of punitive damages based on corporate wealth, and they objected to the determination of the amount of punitive damages without bifurcating the trial.

Before trial, the Sauer Estate filed a motion to bifurcate the trial pursuant to Ark. R. Civ. P. 42(b), which is substantially identical to Fed. R. Civ. P. 42(b). The Sauer Estate asked the court to bifurcate the trial so that financial information pertaining to the Advocat Defendants' net worth and the amount of punitive damages would be introduced at a second phase of the trial, only after the jury had already determined liability and the amount of compensatory damages. Contrary to the position taken in their answer, the Advocat Defendants then objected to bifurcating the trial. The Advocat Defendants also moved *in limine* to exclude evidence of their financial condition. The trial court ruled in favor of the Advocat Defendants on both motions.

Following an eight-day trial, the jury returned verdicts for compensatory damages totaling $15.425 million, as well as verdicts for punitive damages of $21 million against each of the Advocat Defendants. The Advocat Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur or, in the Alternative, for New Trial. They filed with their motion an affidavit of William R. Council, who was then the Advocat Defendants' chief financial officer. He now is their chief executive officer. Attached to Mr. Council's post-trial affidavit was a one-page Subsidiary Balance Sheet Summary as of April 30, 2001, with columns for Diversicare Leasing, Diversicare Management, Advocat on an unconsolidated basis, and Advocat on a consolidated basis. Also attached was a Form 10-Q for the quarterly period ended March 31, 2001, for Advocat, Inc. This 10-Q reported Advocat, Inc.'s financial results on a consolidated basis. The notes to the consolidated financial statement included a two-page discussion of "Insurance Matters" in which the professional liability insurance available to the company and the premiums to be paid for that insurance were discussed.

The Sauer Estate moved to strike the affidavit. The Sauer Estate also filed certificates from the Advocat Defendants' liability insurance carriers and excess insurance carriers showing that the Advocat Defendants had liability coverage, including excess coverage, totaling $95 million to pay the judgments.

The trial court declined to consider the post-trial evidence offered by the Advocat Defendants because that evidence had not been introduced at trial and likewise declined to consider the post-trial evidence offered by the Sauer Estate. Based on the evidence introduced at trial, the trial court reviewed the punitive damage awards in light of each of the three factors articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and concluded that two of the three *Gore* factors had been met in this case. Pet. App. 39a-51a. The trial court declined to order a remittitur or a new trial. Thereafter, the Advocat Defendants' insurers collectively posted supersedeas bonds totaling $86,267,500.

On appeal to the Supreme Court of Arkansas, the Advocat Defendants raised one evidentiary issue,[1] two challenges to the jury instructions, challenges to the sufficiency of the evidence, and arguments that both the compensatory damage awards and the punitive damage awards were excessive. Pet. App. 1a-2a. The Supreme Court of Arkansas found that the one evidentiary challenge was without merit; ruled that no challenge to the jury instructions had been preserved and

1. The evidentiary issue related to the admission of two redacted OLTC surveys showing that the nursing home at issue was understaffed while Mrs. Sauer was a resident. As noted above, no evidence was introduced of alleged misconduct by the Advocat Defendants in other states, so no issue was raised on appeal regarding evidence of misconduct in states other than Arkansas.

that the jury instructions were proper in any event; ruled that the challenges to the sufficiency of the evidence had been waived because the Advocat Defendants failed to renew their motion for a directed verdict at the conclusion of all the evidence; ordered a remittitur of the compensatory damages to $5.425 million[2]; and ordered a remittitur of the punitive damages to $21 million, all to be assessed jointly and severally. Pet. App. 1a-38a. The Supreme Court affirmed the trial court's decision to consider only evidence introduced at trial. Pet. App. 17a. The Advocat Defendants did not file a petition for rehearing as permitted by Rule 2-3 of the Rules of the Supreme Court of Arkansas.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

### The Supreme Court of Arkansas Erred In Failing To Recognize That The Most Important Indicium Of The Reasonableness Of Punitive Damages Is The Reprehensibility Of The Conduct And In Failing To Recognize The Weight To Be Given To The Terms Of Imprisonment For The Conduct At Issue.

The Supreme Court of Arkansas stated in its opinion in this case, "[t]hough the Sauer Estate's counsel disputed this at oral argument, we conclude that the three *Gore* criteria must be given equal weight." That statement is contrary to this Court's holding in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), where this Court stated, "[p]erhaps *the most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of

2. Damages totaling $425,000 were not contested on appeal. Pet. App. 9a, n.2. The court ordered a remittitur of the remaining compensatory damages to $5 million.

the defendant's conduct." (Emphasis added.) That statement in the *Gore* opinion was annotated in footnote 23 with the following quotation: "The flagrancy of the misconduct is thought to be the *primary consideration* in determining the amount of punitive damages." *Id.* at n.23 (emphasis added) (citing Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 387 (1994)). That the reprehensibility of the conduct is "the most important indicium of the reasonableness of a punitive damages award" was reiterated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003). The Supreme Court of Arkansas's holding that the three *Gore* factors should be given "equal weight" is contrary to this Court's pronunciations in both *Gore* and *State Farm*.[3]

The misapprehension of the Supreme Court of Arkansas as to the relative weight to be given to the three *Gore* factors led the court to conclude, erroneously, that the punitive damages awards in this case were excessive under the three *Gore* factors.

This case unquestionably presents highly reprehensible behavior. The jury answered separate interrogatories for each defendant and stated that each defendant engaged in conduct that was the proximate cause of the death of Margaretha Sauer. Pet. App. 55a. The jury also answered separate interrogatories finding that each defendant engaged in conduct that warranted punitive damages. Pet. App. 56a. The jury was instructed that it could find that punitive

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3. The Sauer Estate's brief in the Supreme Court of Arkansas quoted the language above from the *Gore* opinion. Supplemental Abstract, Brief, and Supplemental Addendum of Appellee at 38. This was not an argument raised for the first time at oral argument.

damages were warranted only if it found that the defendants knew or should have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in injury and that they continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred. Hence, the jury found that the Advocat Defendants caused the death of Margaretha Sauer and did so by conduct that showed either malice or reckless indifference to the health and safety of others from which malice may be inferred. The defendants waived their challenge to the sufficiency of the evidence as to the findings by the jury. Pet. App. 15a-16a, 28a-29a. Moreover, the Supreme Court of Arkansas specifically found, upon *de novo* review, "[w]e have no hesitancy in concluding that the reprehensibility of the Appellants' conduct in this case was high." That finding is amply supported by the record, which shows that the defendants were advised by the families of residents, employees, and the Office of Long-Term Care ("OLTC") of the State of Arkansas that the facility had inadequate staff to care for the residents. These warnings were ongoing for at least a year and a half before the death of Mrs. Sauer. Not only did the defendants fail to rectify this dangerous under-staffing, after many warnings that they needed to do so, but they also engaged in "attempts to disguise this fact." Pet. App. 17a. They attempted to conceal their dangerous under-staffing from the OLTC by bringing staff from other facilities to this facility during OLTC surveys, by placing uncertified staff on the floors during OLTC surveys in an effort to make it appear that the facility was adequately staffed when in fact it was not, and by deliberately falsifying records. Pet. App. 21a.

This is not a case like *State Farm*, where the "harm arose from a transaction in the economic realm[.]" 123 S. Ct. at

1524. Here, unlike *State Farm*, the harm arose from physical trauma and physical injury. *Cf. id* at 1525. Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. In *Gore*, the harm BMW inflicted "was purely economic in nature." 517 U.S. at 576. In *Gore*, the Court said, "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." *Id.* Here, as noted above, the verdict required a finding that the Advocat Defendants' conduct evinced indifference to or reckless disregard for the health and safety of others.

Here, the target of the conduct was vulnerable, which this Court has said is one of the indicia of reprehensibility. *State Farm*, 123 S. Ct. at 1521. Here, the conduct was not an isolated incident. The evidence showed that the under-staffing, which continued through many complaints from employees and families of residents, as well as at least two OLTC reports, was the product of a premeditated and calculated shift in corporate philosophy from emphasizing quality of care to emphasizing becoming the low-cost provider. Moreover, as noted above, the harm here was the product of trickery or deceit. As the Supreme Court of Arkansas correctly held in its opinion, the Advocat Defendants engaged in deliberate efforts to deceive OLTC investigators and others so that their conduct could not be stopped. *Cf. id.* The Supreme Court of Arkansas properly found that the conduct of the Advocat Defendants was highly reprehensible.

After remittitur, the compensatory damages total $5.425 million. The punitive damages awarded by the jury were $21 million for each defendant or $63 million in total. Viewed separately, as the Advocat Defendants argue in their petition for writ of certiorari that they should be, the ratio of punitive

damages to the compensatory damages awarded by the jury is less than 4:1. If the punitive damages awarded by the jury are viewed collectively, the ratio to the remitted compensatory damages is $63 million to $5.425 million or less than 12:1. Either ratio is well within what this Court has deemed reasonable. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court upheld a punitive damage award of $10 million in a case in which the compensatory damages were $19,000. The Court did so, in part, because punitive damages should bear a reasonable relationship to the harm likely to result from the defendants' conduct as well as the harm that has actually occurred. *Id.* at 460. *See also Gore*, 517 U.S. at 581. The harm actually caused here was horrendous; it was far worse than the harm caused in *TXO*, which was purely economic. The harm likely to result here is incalculable in economic terms. The defendants' conduct jeopardized the health, safety, and lives of every resident at this nursing home. The harm that was likely to result from the defendants' conduct, as well as the harm that actually occurred, was so far worse than the harm that actually occurred or could have occurred in *TXO*, or in any other case in which this Court has reviewed a punitive damage award, that neither a 4:1 ratio nor a 12:1 ratio of compensatory damages to punitive damages could be deemed excessive.

The remaining *Gore* factor involves comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 583. Here, the Supreme Court of Arkansas noted that the conduct of the defendants constituted adult abuse, which is punishable under the Arkansas Criminal Code as a Class D felony. A Class D felony is punishable by a fine not to exceed $10,000 and a sentence of imprisonment not to exceed

six years. Ark. Code Ann. § 5-4-201(a)(2) and § 5-4-401(a)(5). As the Supreme Court of Arkansas noted in its opinion, "[i]t is impossible to know how many violations might have occurred." Pet. App. 25a. Considering only the 19 days in July 1998 when Mrs. Sauer was not fed or given water, each meal that she missed and each occasion when she should have been given water but was not could be deemed a separate Class D felony and could have resulted in a separate term of imprisonment. Hence, it is impossible to say that the punitive damages awards by the jury were excessive compared to the criminal penalties that could have been imposed. Even though the Supreme Court of Arkansas noted that, had the Advocat Defendants been found guilty, their conduct would be considered multiple felonies, the court failed to account for the fact that the State of Arkansas would impose terms of imprisonment for those felonies. Hence, the court failed to recognize that the State had given notice of the severity of sanctions that might be imposed for such conduct. While this Court cautioned in *State Farm* that great care must be taken to insure that the civil process is not used to impose criminal penalties, nonetheless, the Court recognized that the existence of a criminal penalty does have a bearing on the seriousness with which a state views a wrongful action. *State Farm*, 123 S. Ct. at 1526. The prospect of terms of imprisonment should have the greatest bearing where the actual harm is not purely economic and not susceptible to precise monetary measurement.

Notwithstanding its recognition that the conduct could be classified as multiple felonies, the Supreme Court of Arkansas held, the "third criterion in *Gore* has not been met." Pet. App. 25a. This third *Gore* factor was the only one that the Supreme Court of Arkansas found not to be met in this case.

The Supreme Court of Arkansas's erroneous statement that the "three *Gore* criteria must be given equal weight" (Pet. App. 20a) ties directly to its decision to order a remittitur of the punitive damages based on its conclusion that the "third criterion in *Gore* has not been met." Had the Supreme Court of Arkansas followed this Court's mandate in *Gore* and in *State Farm* to regard reprehensibility as the most important indicium of the reasonableness of a punitive damages award, it would not have ordered a reduction of the punitive damages in this case. Had the court correctly analyzed the third criterion, it would not have ordered a remittitur of the punitive damages in this case.

## CONCLUSION

For the reasons stated in their opposition to the Advocat Defendants' petition for writ of certiorari, the Sauer Estate contends that this Court should not accept this case for review. However, if the Court grants the petition, the Sauer Estate respectfully submits that the Court should review the application of the *Gore* factors *de novo*, correct the mistake made by the Supreme Court of Arkansas in its statement that the three *Gore* factors should be given equal weight, and reinstate the jury verdicts of $21 million in punitive damages for each of the three defendants.

Respectfully submitted,

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